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Supreme Court of the United States.

OCTOBER TERM, 1973.

No.

EDWIN L. SULLIVAN,
DEFENDANT, PETITIONER,
v.
UNITED STATES OF AMERICA,
PLAINTIFF, RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment herein of the United States Court of Appeals for the First Circuit entered in the above entitled case on June 4, 1974.

Opinion Below.

The opinion of the Court of Appeals cited is not yet reported. [1] It affirmed a conviction of the United States District Court for the District of Rhode Island.

[1] Copy of it is made a part of this petition as Appendix A.

Jurisdiction.

The judgment of the United States, Court of Appeals was entered on June 4, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 28 U.S.C. 1651 and 28 U.S.C. 2106.

Questions Presented.

1. Whether the Court of Appeals in affirming the conviction of the United States District Court for the District of Rhode Island erred in not applying the usually accepted rule that, in order to convict, active participation in the crime must be present.

2. Whether the Court of Appeals erred in affirming the conviction of the District Court by holding that 29 U.S.C. 501(c) was properly applied to the petitioner.

3. Whether, by its decision, the Court of Appeals committed error in holding that the contentions raised by the petitioner in his argument before the Court of Appeals on the refusal of the District Court to entertain motions of acquittal both after the government's case had been presented and also after all of the evidence had been presented were without merit.

4. Whether the Court of Appeals committed error in its decision holding that the other arguments presented to it in connection with motions to dismiss the indictment, motion for judgment of acquittal, and the objections made by the petitioner to the District Court's instructions to the jury, were without merit or constituted harmless error.

5. As a matter of law, is the petitioner within the class of persons to which 29 U.S.C. 501(c) applied?

Constitutional Provision Involved.

AMENDMENT V.

"No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

Statutes and Regulations Involved.

(1) 29 U.S.C. 402(n).

" 'Officer' means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body."

(2) 29 U.S.C. 402(q).

" 'Officer, agent, shop steward, or other representative', when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel."

(3) 29 U.S.C. 501(a).

"The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. . . ."

(4) 29 U.S.C. 501(c).

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Statement of the Case.

Edwin L. Sullivan, petitioner, was indicted with others in a 16-count indictment for violation of 29 U.S.C. 501(c). The petitioner was named in two substantive counts, and in one conspiracy count. He was tried alone, as one of the other co-defendants had died prior to trial, and another co-defendant was declared incompetent. After trial by jury under two substantive counts, he was found guilty and fined $1,000 for violation of one count and $500 for violation of the other. A notice of appeal was duly filed in the United States District Court for the District of Rhode Island and briefs and argument presented to the United States Court of Appeals for the First Circuit which on June 4, 1974, affirmed the conviction of the District Court.

During the course of the proceedings in the United States District Court, several motions were filed in behalf of Mr. Sullivan. The first of these motions that concern Mr. Sullivan was the motion to dismiss the indictment and to suppress evidence.

The next motions, which are of importance, were made during the trial, being motions for a judgment of acquittal at the close of the Government's case, at the close of all evidence, and, finally, after verdict.

Since 1950 the petitioner had been employed by the International Union of Operating Engineers, Local 57, as an office clerk. He was a member of Local 57 and his duties as an office clerk consisted of ministerial tasks. The testimony at the trial produced by the Government was to the effect that the petitioner would assign men to various jobs when instructed to do so by the business manager and that he had no discretion to act without the command of the business manager. He would prepare checks for payment of the Local's expenses, upon direction from the business manager, but he had no authority to sign the checks.

The petitioner also held an elected position with the Local, that of "guard." The evidence was that this was a ritualistic office, with no executive, fiduciary or discretionary duties attached to the title.

Counts 3 and 11 of the indictment[2] charged the petitioner with embezzlement, theft, abstraction and conversion of funds of the Local in violation of § 501(c). Count 3 was based upon the receipt of an unauthorized pay increase, and count 11 was based upon the receipt of unauthorized Christmas bonuses for the years 1968, 1969 and 1970. The unauthorized pay increase consisted of a wage increase of $35 per week. The Christmas bonuses for the years 1968, 1969 and 1970 amounted to $120, $125, and $200 respectively. All federal, state and local withholding taxes were deducted from all receipts.

After trial, the jury found the defendant guilty on the two counts, which conviction was affirmed by the United States Court of Appeals for the First Circuit.

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[2] Copy of it is made a part of this petition as Appendix B.

Reasons for Granting the Writ.

I.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW, FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND ERRED IN NOT DISMISSING THE INDICTMENT AND QUASHING THE EVIDENCE, WHICH DECISION IN EFFECT WAS AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Motions to dismiss the indictment and to suppress evidence were filed before the District Court on behalf of the petitioner. The evidence sought to be suppressed was certain cancelled checks subpoenaed before a federal grand jury which commenced its activities on October 20, 1970; and the same evidence was again presented to a later grand jury which commenced its activities on October 19, 1971. The second grand jury returned the indictment, on which two counts petitioner was convicted. These documents were the keystone of the Government's case against the petitioner. Rule 6(g) of the Rules of Criminal Procedure for the United States District Courts provides a limited life for a federal grand jury and this first grand jury which began its existence on October 20, 1970, was discharged on September 8, 1971. When its term expired on September 8, 1971, this first grand jury had no authority to deliver these records to any other government agency and the records should have been returned to Local 57 on or about September 8, 1971. See, in this connection, *Application of Bendix Aviation Corp.*, 58 F. Supp. 953 (S.D. N.Y. 1945); *John Rosenblum, Inc.* v. *Gillespie*, 187 F. Supp. 258 (S.D. N.Y. 1960).

When the first grand jury ceased to exist, the Department of Justice had no authority to submit such records

to another federal grand jury without the permission of the owner of such records or authority given by a federal district court before the expiration of its term. *In Re Grand Jury Investigation of Banana Industry,* 214 F. Supp 856, 858 (D. Md. 1963); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 21 F.R.D. 233, 235.

II.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW, IF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IN AFFIRMING THE CONVICTION OF THE UNITED STATES DISTRICT COURT INCORRECTLY APPLIED THE PROVISIONS OF 29 U.S.C. 501(c) TO THE PETITIONER.

Defendant was indicted and convicted under the provisions of 29 U.S.C. 501(c). Section 501 is entitled "Fiduciary responsibility of officers of labor organizations. Subsection (a)—"Duties of officers; exculpatory provisions and resolutions void."—states the policy of the section. It begins:

> "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group."

That phrase is defined in 29 U.S.C. 402(q) as follows:

> " 'Officer, agent, shop steward, or other representative', when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include *salaried nonsupervisory pro-*

fessional staff, stenographic, and service personnel." (Emphasis added.)

The government has relied upon the definition of "Officer" contained in 29 U.S.C. 402(n), which is:

> " 'Officer' means *any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.*" (Emphasis added.)

The federal court previously adhered to the definition contained in subsection 402(q) and not that of subsection 402(n). *Colella* v. *United States*, 360 F. 2d 792 (1st Cir. 1966).

The Government's case rested on the proposition that Mr. Sullivan was an officer and employee of Local 57. It was proven that he held the office of "guard" in the Local, and was an office clerk. The duties of guard were set out in the Constitution of the International Union of Operating Engineers, as follows:

> "It shall be the duty of the Guard to take charge of the doors at meetings to see that none but members in good standing and with the quarterly password enter; to allow no member to retire without the consent of the President; to announce the names of all those without the password desiring admission and to admit such as the President shall designate; to furnish the General President full and complete information on any subject within his control or knowledge when requested and to perform such other duties as are customarily incident to his office or which from time to time may

> be delegated to him by the Local Union or other authorities."

It is obvious that the office of guard was an honorarium, being ritualistic, and carried with it no fiduciary responsibility or executive discretion attributable to the class of officers referred to in the first subsection of § 501, as defined in subsection 402(q).

The only duty performed by petitioner that could possibly be characterized as "fiduciary" was performed as office clerk, when occasionally he would receive dues from some members when they came into the Local's office. However, the activity for which he was indicted and convicted did not involve those funds. His offense involved the receipt of an unauthorized pay increase and three Christmas bonuses.

In *Colella* v. *United States, supra,* at page 799, the First Circuit Court of Appeals recognized that subsection 501(c) was applicable to a certain class of individuals defined by Congress in subsection 501(a) and subsection 402(q). The Court of Appeals acknowledged that any employee of a labor organization could be found in violation of subsection 501(c) provided his duties were brought within these definitions:

> "The indictment as drawn in this case might have applied as well to a custodial employee as to defendant, *who in fact was an organizer who exercised independent authority.*" (Emphasis added.) 360 F. 2d at 800.

Neither as guard nor as clerk was the Government able to prove that Mr. Sullivan acted with any executive discretion, nor with organizational powers.

Except for the readily distinguishable case of *Doyle* v. *United States,* 318 F. 2d 419 (8th Cir. 1963), all the reported cases dealing with convictions under subsection 501(c) show as an element of the crime a breach of a fiduciary responsibility by an individual who was an officer of constitutional statute with substantial discretion and fiduciary responsibility. *Woxberg* v. *United States,* 329 F. 2d 284 (9th Cir. 1964), cert. den. 379 U.S. 823, 85 S. Ct. 45 (1964) (secretary-treasurer, highest officer locally); *United States* v. *Silverman,* 430 F. 2d 106 (2d Cir. 1970), cert. den. 91 S. Ct. 1619 (concurrently held positions of president of a teamsters local, business manager of an electrical workers local, trustee and administrator of a metal and wireworkers pension fund); *United States* v. *Bauer,* U.S.C.A. (4th Cir. 1973), 70 L.C. par. 13,511 (president of a lithographers and photoengravers local); *United States* v. *Stubin,* 446 F. 2d 457 (3d Cir. 1971) (secretary-treasurer of a laborers union local); *United States* v. *Ferrora,* U.S.C.A. 2d 1971, 66 L.C. par. 12,181 (president and secretary-treasurer of a bartenders union local); *United States* v. *Dibrizzi,* 393 F. 2d 642 (2d Cir. 1968) (general vice president, longshoremans association); *Colella* v. *United States, supra,* 360 F. 2d 792 (chief labor organizer, international electrical workers union).

In *Doyle* v. *United States, supra,* defendant was convicted of a violation of subsection 501(c). She was the bookkeeper of the union, and collected dues as a regular part of her duties. What distinguishes that case from the instant case is that the funds which she allegedly appropriated to herself were the funds that had been entrusted to her as a collecting agent. The court held, *inter alia,* that it was not an essential element of the crime charged that the monies had been held by her in some fiduciary capacity. On the other hand, the funds in fact were so held, and she

in fact performed more than the service function performed by petitioner for Local 57.

Next in importance is the issue of intent. The Government has founded its case on the Constitution of the International Union of Operating Engineers, Article XXII, § 4, which prohibits:

> "Any and all diversion of funds from a Local Union . . . for the personal benefit of individual members by way of gifts, additional compensation for benefits or services otherwise paid for, retroactive compensation for services not previously authorized and similar situations shall be illegal and void unless . . . such payment is specifically approved by the membership and is approved in writing by the General President."

Petitioner took no affirmative action to obtain the raise. Since the petitioner neither sought nor expected his pay raise, nor sought, nor expected his Christmas bonuses, the fixing of his intent must be attributed in his knowledge that in so doing he was violating the section of the Constitution referred to above.

There are, however, two factors that militate against his knowledge that the increase and bonuses were not authorized by the membership. Firstly, broad powers were given to business managers of local unions by the Constitution of the International Union of Operating Engineers. Secondly, there was no showing by the Government that the petitioner ever saw or had access to the Minute Book of Local 57 to determine for himself that his increase and bonuses were not authorized. In light of the record, there is a serious doubt as to whether it is reasonable to charge a clerical employee of a labor union with criminal responsibility for failure to question the propriety of accepting a

$35 pay increase after many years of employment with the union and of accepting three Christmas bonuses of approximately one and one-half times his weekly salary for three successive years.

III.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW, IF THE COURT OF APPEALS COMMITTED ERROR IN AFFIRMING THE DECISION OF THE DISTRICT COURT IN FAILING TO GRANT PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE.

The only evidence before the jury at the close of the Government's case was that the petitioner was an office clerk performing service duties and that he held a minor office, that of guard. At that point of the testimony, there was no evidence that occasionally he collected dues at the office.

It is submitted that the petitioner as a clerk was specifically excluded from the operation of 29 U.S.C. 501(c) by the definitions contained in 29 U.S.C. 402(q) as follows:

> "... but does not include salaried nonsupervisory professional staff, stenographic, and service personnel."

Furthermore, petitioner was not a constitutional officer. Therefore, even if the Government's anticipated position as to 29 U.S.C. 402(n) is followed, petitioner is excluded under the definition of officer contained therein.

Since at the close of the Government's case there was no evidence, by inference or otherwise, as to the petitioner being a member of the class at which 29 U.S.C. 501 was directed, the District Court erred in not granting his motion for judgment of acquittal at this point in the trial and the Court of Appeals also committed error in sustaining the decision of the District Court.

The Court of Appeals admits in its decision as follows:

> "Initially, we must note that the alleged wrongdoing on the part of the defendant is somewhat unique to prosecutions under § 501(c). Whereas most criminal actions brought pursuant to that section involve 'affirmative' misconduct—generally in the form of either intentional falsification of union expense vouchers, *see, e.g., United States* v. *Dibrizzi*, 393 F. 2d 642 (2d Cir. 1968); *Colella* v. *United States, supra*, improper application of union funds by union management, *see, e.g., United States* v. *Boyle* 482 F. 2d 755 (D.C. Cir), *cert. denied*, 42 U.S.L.W. 3228 (Dec. 3, 1973); *United States* v. *Silverman*, 430 F. 2d 106 (2d Cir.), *modified per curiam on other grounds*, 439 F. 2d 1198 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971), or illicit behavior approaching outright theft, *see, e.g., United States* v. *Bryant*, 430 F. 2d 237 (5th Cir. 1970) —defendant here was essentially convicted of having 'passively' received unauthorized salary increases and Christmas bonuses, knowing the same to have been unauthorized, and hence, illegal."

The Government at trial did not establish that the petitioner had the requisite intent to be convicted of the crime of which he was so charged. There must be a set of circumstances or facts upon which criminal intent may be inferred. None existed when the Government closed its case.

IV.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW, IF THE COURT OF APPEALS COMMITTED ERROR IN AFFIRMING THE DECISION OF DISTRICT COURT IN FAILING TO GRANT PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE.

When both sides had rested, the only additional evidence before the jury was that the petitioner collected some of the dues for Local 57 as a clerk and he attended some executive board meetings of the union. The capacity in which he attended these meetings was never established, but the only possible inference was as that of guard. It is submitted that the Government had the burden of introducing direct proof, or facts upon which inferences might be drawn, that Mr. Sullivan was the type of officer defined in subsections 402(q) or 402(n), and not the type of employee specifically excluded in subsection 402(q).

Since the Government had not established petitioner's membership in the class intended to be covered by § 501, nor his criminal intent, the court should have granted petitioner's motion for acquittal at the close of all the evidence and the Court of Appeals should have sustained the petitioner's argument in this regard.

V.

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO REVIEW, IF THE COURT OF APPEALS FAILED TO OVERTURN THE DECISION OF THE DISTRICT COURT IN CONNECTION WITH THE OBJECTIONS RAISED BY THE PETITIONER AS TO THE INSTRUCTIONS GIVEN BY THE DISTRICT COURT TO THE JURY.

The Court of Appeals in its decision stated:

> "The remaining contentions raised by defendant have been carefully examined and have been found to

be either clearly without merit or at most to constitute harmless error."

In effect, the Court of Appeals in its decision disregarded all of the arguments made by the petitioner in connection with jury instructions, and it is the petitioner's contention that since the instructions to the jury were not given in light of all the testimony, in effect his constitutional rights under the Fifth Amendment were taken away.

The District Court refused to charge the jury concerning his status as an officer and employer, and the failure to charge the jury as requested removed this element from the jury's consideration. The jury could have found that Mr. Sullivan was not a member of the class at which 29 U.S.C. 501 was directed. It is maintained that this is an essential element of the Government's proof, and it should have been for the jury to determine this fact. The court by not so instructing the jury had the effect of directing the jury to find that Mr. Sullivan was such a class member.

It had been agreed prior to the commencement of trial, in chambers, not to make any reference to the names of the other co-defendants, one of whom had died prior to trial, and the other having been adjudged incompetent to stand trial. In adhering to this ruling the United States Attorney read the indictment in his opening and specifically excluded any reference to the co-defendants. The District Court on the other hand began its instructions by reading the indictment *in toto*, as to counts III and XI, and the petitioner was then of the opinion and still is of the opinion that the jury was confused, since it was the first time the confederation of the petitioner with either or both of the

co-defendants had been brought to the attention of the jury and, in fact, the jury registered its confusion by inquiring from the District Court judge the following:

> "Dear Judge: What names appear on Sections 3 and 11 of the indictment?"

The District Court instructed the jury on embezzlement and stealing and there was no evidence that the petitioner was entrusted with any of the funds which were in the form of receiving an unauthorized pay increase and unauthorized Christmas bonuses. These were funds he was not entrusted with. The only funds that the Government was able to show that the petitioner was entrusted with were some membership dues given to him by members of the Local as the office clerk and these were not funds that were involved in the indictment.

Knowledge, the petitioner contends, is a vital element to the Government's case. The failure of the court to instruct the jury that it must find beyond a reasonable doubt that he knew that the acceptance of his pay increase and Christmas bonuses was illegal was error, and it was further error for the District Court not to instruct the jury on the common law definitions of embezzlement, stealing, abstracting and converting. *Woxberg* v. *United States*, 329 F. 2d 284 (9th Cir. 1964). *United States* v. *Brill*, 350 F. 2d 171 (2d Cir. 1965).

The Court of Appeals, in not referring to these important points, committed further error in affirming the decision and verdict of the District Court.

Conclusion.

For the reasons aforesaid, it is respectfully submitted that this petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the First Circuit entered on June 4, 1974.

Respectfully submitted,

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July 1, 1974.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1020

UNITED STATES OF AMERICA,
APPELLEE,
v.
EDWIN L. SULLIVAN,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Peter Lawson Kennedy, with whom *Adler, Pollock & Sheehan* was on brief, for appellant.

Lauren S. Kahn, Department of Justice, with whom *Lincoln C. Almond*, United States Attorney, *S. Michael Levin*, Special Attorney, Department of Justice, and *Jerome M. Feit*, Attorney Department of Justice, were on brief, for appellee.

June 4, 1974

McENTEE, *Circuit Judge*. Defendant was convicted by a jury on two counts of unlawfully and willfully embezzling,

stealing, abstracting and converting to his own use funds of the International Union of Operating Engineers, Local No. 57, of which he was an employee and minor official, in violation of 29 U.S.C. § 501(c) (1970). On appeal, defendant principally contends that § 501(c) could not have been properly applied to him, and further that, in any case, the evidence presented at trial did not support his conviction.

Defendant's initial claim is substantially without merit. Section 501(c) provides unambiguously that

> "*Any person* who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use . . . any of the moneys, funds, securities, property or other assets of a labor organization *of which he is an officer, or by which he is employed* [is guilty of a crime]." (Emphasis supplied).

At the time of the illicit activities alleged in the indictment, it is undisputed that defendant was a bonded employee of the local union's business office, being responsible, in part, for the preparation of checks and the acceptance and receipt of monthly union dues. Moreover, during this period, defendant occupied the union office of Guard, though the evidence revealed that this position was largely a ceremonial one.[1] Consequently, it seems

[1] Pursuant to the Constitution of the International Union of Operating Engineers, the essential functions of the Guard consist of "tak[ing] charge of the doors at meetings to see that none but members in good standing and with the quarterly password enter, . . . furnish[ing] the General President [with] full and complete information on any subject within his control or knowledge when requested and . . . perform[ing] such other duties as are customarily incident to his office or which from time to time may be delegated to him by the Local Union."

evident that, upon consideration of defendant's status both as an employee and an officer, § 501(c) would *prima facie* apply to proscribe his participation in the unlawful conduct described therein. However, defendant contends that it was the Congressional intent to limit the full applicability of § 501(c) strictly to those particular union positions, described by 29 U.S.C. §§ 402(q), 501(a) (1970), which involve certain fiduciary obligations vis-a-vis the union.[2] Since defendant further contends that his functions within the union did not fall within the ambit of the fiduciary relationships defined in §§ 402(q) and 501(a), he therefore claims that § 501(c) has no applicability to him.

Preliminarily we note that even a liberal construction of this court's decision in *Colella* v. *United States*, 360 F.2d 792, 799, *cert. denied*, 385 U.S. 829 (1966), compels rejection of defendant's broad contention that §§ 402(q) and 501(a) completely circumscribe § 501(c). While recognizing that "insofar as embezzlement is concerned, the existence of a fiduciary relationship is necessary" for conviction, our opinion in *Colella* emphasized that

> "[w]e are not dealing with an indictment charging simply embezzlement. Section 501(c) establishes 'a new Federal crime of embezzlement of any funds of

[2] Section 501(c) states, *inter alia*, that "officers, agents, shop stewards and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." These officials are vested with a statutory fiduciary responsibility to "hold [union] money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws." Section 501(c) is to some extent modified by § 402 (q) so as to include within its terms "elected officials and key administrative personnel, whether elected or appointed . . ., but . . . not . . . salaried, non-supervisory professional staff, stenographic, and service personnel."

> a labor organization.' [citation omitted] The new crime can be accomplished in one of four ways: embezzling, stealing, unlawfully and willfully abstracting, and unlawfully and willfully converting." 360 F.2d at 799.

And, while suggesting that a § 501(a) or § 402(q) fiduciary relationship may arguably be an "essential element of the embezzlement means of committing the new federal crime,[3] *Colella* seems to make clear that such a relationship "is not essential to the three other means." *Id.* at 800 n.6. *See Doyle* v. *United States*, 318 F.2d 419 (8th Cir. 1963). Moreover, since, as we said in *Colella*, we "cannot imagine facts constituting embezzlement which would not also, absent a fiduciary relationship make out unlawful and willful abstraction or conversion," 360 F.2d at 800, the defendant in the instant case would not have been prejudiced by the fact that he conceivably could not have been convicted of traditional embezzlement, on the assumption that his union functions were not covered by §§ 402(q) and 501(a). "As far as the defendant is concerned, he has been placed in jeopardy with respect to all means of committing the offense by the proper manner of substi-

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[3] Though the existence of a "fiduciary relationship" was held to be a fundamental attribute of embezzlement, and though the *Colella* court noted that Congress had "spelled out [and refined] its own definition" of this relationship in §§ 402(q) and 501(a), it is by no means clear that the nature of the fiduciary obligations necessary to sustain a conviction for embezzlement under § 501(c) is strictly dependent upon §§ 402 (q) and 501(a). The *Colella* court had no occasion to formally face the issue of whether a union functionary whose responsibilities do not fall precisely within the terms of §§ 402(q) and 501(a) could nevertheless be found to possess the requisite fiduciary relationship. Since resolution of this question is not directly necessary to our decision, we express no view upon it. *But cf. Johnson* v. *Nelson*, 325 F.2d 646 (8th Cir. 1963).

tution in the indictment of the conjunctive 'and' for the statutory disjunctive 'or'. [citations omitted]." *Id.*

Thus, the impact of §§ 402(q) and 501(a) is at best limited to its effect upon the embezzlement provision of § 501(c), *but see* note 3 *supra*, and does not preclude a non-fiduciary union employee or officer from being subject to the remaining three aspects of that section.[4] Nonetheless, even if we were to accept, for the sake of argument, defendant's contention regarding the limiting role of §§ 402(q) and 501(a), we would still be forced to reject his argument.

In the first place, defendant is an elected officer of the union, and strictly speaking, no matter how ceremonial, § 501(a) invests in such officers the requisite fiduciary obligations necessary to sustain conviction under § 501(a), *see* note 2 *supra*, even were that section to be modified in the manner defendant suggests. Given the broad protective purposes underlying § 501, *see, e.g., United*

[4] Although defendant has cited numerous cases in which union officials who, having breached their fiduciary obligations, have been convicted under § 501(c), *see, e.g. United States* v. *Ferrara*, 451 F.2d 91 (2d Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); *United States* v. *Stubin*, 446 F.2d 457 (3d Cir. 1971); *United States* v. *Silverman*, 430 F.2d 106 (2d Cir.), *modified per curiam on other grounds*, 439 F.2. 1198 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); *United States* v. *Dibrizzi*, 393 F.2d 642 (2d Cir. 1968), it is clear from a close reading of these cases that none of them stand for the broad proposition that a breach of fiduciary responsibility is either a necessary or essential element of conviction under § 501(c). "The terms used in [§ 501(c)] retain their common law meaning." *Woxbury* v. *United States*, 329 F.2d 284, 290 (9th Cir.), *cert. denied*, 379 U.S. 823 (1964). Though common law embezzlement "carries with it the concept of a breach of fiduciary relationship," *Colella* v. *United States*, *supra*, 360 F.2d at 799, neither "stealing," "abstraction," nor "conversion" do. We see no reason grounded in policy or logic to extend to these terms a requirement of breach of fiduciary responsibility.

States v. *Goad*, 490 F.2d 1158, 1161-62 (8th Cir. 1974) *cert. filed*, 42 U.S.L.W. 3501 (Feb. 22, 1974) (No. 73-1293); *Johnson* v. *Nelson*, 325 F.2d 646, 650 (8th Cir. 1963), we think it entirely appropriate to construe the § 501(a) term "officer" in its most literal sense to include *all* union officers, no matter how minor their responsibilities. Certainly, it would violate the important judicial and social policy of clarity in the law to permit each potential § 501(c) defendant-officer to attempt to establish that his particular official functions were not comprehended within the "true" spirit of § 501(a). Moreover, to place a narrow construction on the term "officer" might, as in this case, necessitate excluding from § 501 coverage, an individual who, while not a high union official, did play, as the record reveals, a significant role in the administration of local union affairs.

But beyond defendant's arguably limited role as an officer pursuant to § 501(a), it is abundantly clear from the record that the defendant was a "key administrative" employee within the meaning of § 402(q) such that, on this account alone, he possessed a sufficient fiduciary obligation with respect to union funds and assets. Along with John White, Sr. and John White, Jr.,[5] defendant was an important and influential member of the union's administrative staff. His responsibility for preparing checks, and for assisting in the collection of dues, constituted a significant role in the necessary performance of daily adminis-

[5] John White, Sr. was the Business Manager of Local 57. His son, John White, Jr. was the President of the Local and also served administratively as its Business Agent. Initially, both were indicted along with the defendant for violations of § 501(c). However, prior to trial, John White, Sr. became legally incompetent, and John White, Jr. died of natural causes.

trative functions.[6] In view of the obvious importance of defendant's role within Local 57, we will not now accept his plaintive claim that he was merely an insignificant clerical employee.

Thus, even under defendant's narrow interpretation of § 501(c), as requiring complete modification by §§ 402(q) and 501(a), his arguments provided little solace since both as an officer, pursuant to § 501(a), and as a key administrative employee, pursuant to § 402(q), defendant possessed the requisite fiduciary relationship with respect to his union necessary to permit application of § 501(c) to him.

We next turn to defendant's additional contention that the evidence adduced at trial will not support his conviction. Initially, we must note that the alleged wrongdoing on the part of defendant is somewhat unique to prosecutions under § 501(c). Whereas most criminal actions brought pursuant to that section involve "affirmative" misconduct—generally in the form of either intentional falsification of union expense vouchers, *see, e.g., United States* v. *Dibrizzi*, 393 F.2d 642 (2d Cir. 1968); *Colella* v. *United States, supra*, improper application of union funds by union management, *see, e.g., United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 42 U.S.L.W. 3328 (Dec. 3, 1973); *United States* v. *Silverman*, 430 F.2d 106 (2d Cir.), *modified per curiam on other grounds*, 439 F.2d 1198 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971), or illicit behavior approaching outright theft, *see, e.g., United States* v. *Bryant*, 430 F.2d 237 (5th Cir. 1970) —defendant here was essentially convicted of having "passively" received unauthorized salary increases and

[6] Additionally, defendant assisted John White, Sr. in determining the assignment of union members to the various jobsites and dealt on a regular business basis with both the union's employers and its accountants.

Christmas bonuses, knowing the same to have been unauthorized, and hence, illegal. However, as the Second Circuit has observed in a somewhat different context, "the reach of § 501(c) is not limited to union officers who engage in stealthy larcenies or devious embezzlements," *United States* v. *Dibrizzi, supra,* 393 F.2d at 645. Considering that § 501(c) was designed essentially to protect general union memberships from the corruption, however novel, of union officials and employees, *see United States* v. *Harmon,* 339 F.2d 354, 357-58 (6th Cir. 1964), *cert. denied,* 380 U.S. 944 (1965), we do not believe that the proscriptions of that section should be read to operate solely against those who violate its terms in an active manner. In our view, the willing acceptance of misappropriated union funds by a recipient who knows that such funds are unauthorized and illegal will constitute a violation of § 501(c). *See United States* v. *Goad, supra: cf. Voxburg* v. *United States,* 329 F.2d 284, 285-93 (9th Cir.), *cert. denied,* 379 U.S. 823 (1964). Consequently, if upon examination of the record, it appears that there was sufficient evidence to permit the jury to conclude beyond a reasonable doubt that the defendant improperly received union funds (in the form of unauthorized raises and bonuses), and if the evidence further permits the valid inference that defendant knew his receipt of such funds was unlawful, we think that his conviction should be sustained. In this regard, it must be kept in mind that the elements of defendant's guilt may be supported entirely by circumstantial evidence, *United States* v. *Stubin,* 446 F.2d 457 (3d Cir. 1971), and that such evidence, including the fair inferences to be drawn therefrom, must be viewed in the light most favorable to the government. *United States* v. *Bryant, supra,* 430 F.2d at 240.

In its case-in-chief, the government introduced documentary evidence which clearly established that, on or about July 15, 1968, defendant began receiving a $35 per week salary increase, which raised his previously existing pay scale from a weekly gross of $125 to one of $160.[7] Additionally, by comparable documentary and testimonial evidence, the government proved that in December of 1968, 1969 and 1970, the defendant received annual Christmas bonuses in amounts totalling $120, $125 and $200 respectively. The receipt of the salary increase and the bonuses constituted separate counts in the indictment upon which defendant was convicted. The government further introduced in evidence the amended Constitution of the International Union of Operating Engineers, by which Local 57 was governed. That document provided in part:

> "Any and all diversion of funds from a Local Union to or for the personal benefit of individual members by way of gifts, additional compensation for benefits or services otherwise paid for, retroactive compensation for services not previously authorized and similar situations *shall be illegal and void unless prior to the payment thereof such payment is specifically approved by the* [*Local's*] *membership and is approved in writing by the* [*International*] *General President.*"

Subsequent introduction of Local 57's minute book for the period covered by the indictment revealed that neither defendant's salary increase nor his Christmas bonuses were ever approved by the local's membership or by the

[7] This pay increase was made retroactive to January 1, 1968. Accordingly, on or about July 18, 1968, defendant also received a payment of $980 to cover the period from January 1, 1968, through July 15, 1968.

General President, as was required by the union constitution.[8] Hence, such payments were, as a matter of unquestioned fact, "illegal and void." Moreover, since, as earlier indicated, the record disclosed that defendant was an officer of Local 57, as well as an influential employee of the union with some twenty years of service outstanding, we think it quite reasonable for the jury to have inferred that defendant was aware of the constitutional requirements for approval of his pay increase and bonuses. However, defendant contends that, notwithstanding these facts, there was no evidence admitted to show that he *actually knew* that his pay raise and bonus payments had not been properly authorized, and thus, that he lacked the requisite willfulness or guilty intent necessary to violate § 501(c). We disagree. Although there was no direct evidence of defendant's knowledge that the payments were unauthorized, we think that this was inferable from the government's other proof. In the first place, the union's minute book indicated that defendant attended virtually every meeting of the general membership during the period covered by the indictment, including all meetings immediately preceding his July 15, 1968, raise and his December 1968, 1969 and 1970 bonuses. Since the constitution required that the general membership approve of these payments, and since his attendance at those meetings must have made it plain to him that no such approval was ever given or even considered, it was clearly reasonable for the jury to conclude that defendant did, in fact, know that the payments were improper and illegal.

[8] Apparently, the decision to appropriate union funds to increase defendant's salary and award him a Christmas bonus was made exclusively by John White, Sr., the Business Manager of Local 57, under whom defendant had long been employed.

Secondly, the evidence establishes a close working relationship between defendant and the Whites, who effectively ran the union. To the extent that the evidence also suggested that the Whites knew, or must have known, that these and other payments were illegal, it was permissible for the jury to infer that defendant possessed the same knowledge. Thus, in our view, the evidence satisfactorily established that defendant, a union officer and employee, improperly received for his own benefit misappropriated and unauthorized union funds, knowing that his receipt of those funds was unlawful. Such evidence is, we believe, sufficient to sustain his conviction under § 501(c).

The remaining contentions raised by defendant have been carefully examined and have been found to be either clearly without merit, or at most, to constitute harmless error.

Affirmed.

Appendix B.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

INDICTMENT NO. Vio. 29 U.S.C. 501(c) and
18 U.S.C. 371

UNITED STATES OF AMERICA
v.
JOHN A. WHITE, SR., also known as John A. White,
JOHN A. WHITE, JR., and EDWIN L. SULLIVAN

The Grand Jury charges:

That from on or about the 15th day of July, 1968, and continuously thereafter to and including the 28th day of December, 1970, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, and JOHN A. WHITE, JR., both named as defendants herein, while employed by and officers, that is, Business Manager and President, respectively, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another the sum of $21,680.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to John A. White, Sr., also known as John A.

White, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT II

The Grand Jury further charges:

That from on or about the 15th day of July, 1968, and continuously thereafter to and including the 28th day of December, 1970, in the District of Rhode Island, JOHN A. WHITE, JR., named as a defendant herein, while employed by and an officer, that is, President, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Section 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to his own use and the use of another the sum of $10,205.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to John A. White, Jr., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT III

The Grand Jury further charges:

That from on or about the 15th day of July, 1968, and continuously thereafter to and including the 28th day of December, 1970, in the District of Rhode Island, JOHN A. WHITE, JR. and EDWIN L. SULLIVAN, both named as defendants herein, while employed by and officers, that is, President and Guard, respectively, of International Union

of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another the sum of $5,589.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to Edwin L. Sullivan, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT IV

The Grand Jury further charges:

That from on or about the 25th day of April, 1967, and continuously thereafter to and including the 1st day of December, 1970, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, and JOHN A. WHITE, JR., both named as defendants herein, while employed by and officers, that is, Business Manager and President, respectively, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another, the sum of $7,134.39 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to Humble Oil and Refining Co., Gulf Oil Corporation, Atlantic Richfield Company and Texaco, Inc., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT V

The Grand Jury further charges:

That on or about the 8th day of May, 1967, in the District of Rhode Island, JOHN A. WHITE, JR., named as defendant herein, while employed by and an officer, that is, President, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to his own use and the use of another the sum of $200.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid a check for the disbursement of the foregoing moneys and funds to Jack Pendleton, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT VI

The Grand Jury further charges:

That from on or about the 15th day of July, 1970, and continuously thereafter to and including the 3rd day of August, 1970, in the District of Rhode Island, JOHN A. WHITE, JR., named as a defendant herein, while employed by and an officer, that is, President, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal,

abstract and convert to his own use and the use of another the sum of $956.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to John A. White, Jr., and Fields and Cusick Travel Service, Inc., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT VII

The Grand Jury further charges:

That on or about the 14th day of February, 1969, in the District of Rhode Island, JOHN A. WHITE, JR., named as a defendant herein, while employed by and an officer, that is, President, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to his own use and the use of another the sum of $247.99 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid a check for the disbursement of the foregoing moneys and funds to Fields and Cusick Travel Service, Inc., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT VIII

The Grand Jury further charges:

That on or about the 17th day of February, 1970, in the District of Rhode Island, JOHN A. WHITE, JR., named as a defendant herein, while employed by and an officer, that is, President, of International Union of Operating En-

gineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to his own use and the use of another the sum of $414.25 of the moneys and funds of said labor organization, by drawing and issuing and causing to be drawn, issued and paid a check for the disbursement of the foregoing moneys and funds to Fields and Cusick Travel, Inc., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT IX

The Grand Jury further charges:

That from on or about the 15th day of February, 1968, to and including the 19th day of February, 1968, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, named as a defendant herein, while employed by and an officer, that is, Business Manager, of International Union of Operating Engineers Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to his own use and the use of another the sum of $1,722.56 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to John A. White, Sr., also known as John A. White, and Fields and Cusick Travel Service, Inc., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT X

The Grand Jury further charges:

That from on or about the 14th day of February, 1968, to and including the 15th day of April, 1970, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, and JOHN A. WHITE, JR., both named defendants herein, while employed by and officers, that is, Business Manager and President, respectively, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another the sum of $201.80 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to Fields and Cusick Travel Service, Inc., and New England Telephone Company, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT XI

The Grand Jury further charges:

That from on or about the 20th day of December, 1968, and annually thereafter to and including on or about the 16th day of December, 1970, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, JOHN A. WHITE, JR., and EDWIN L. SULLIVAN, all named as defendants herein, while employed by and officers, that is, Business Manager, President and Guard, respectively, of International Union of Operating Engineers,

Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and use of another the sum of $3,600.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to John A. White, Sr., also known as John A. White, John A. White, Jr., Edwin L. Sullivan and others unknown to the Grand Jury, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT XII

The Grand Jury further charges:

That on or about the 7th day of April, 1969, and on or about the 21st day of May, 1969, in the District of Rhode Island, JOHN A. WHITE, JR., named as a defendant herein, while employed by and an officer, that is President, of International Union of Operating Engineers, Local No. 57, a labor organization in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convey to his own use and the use of another the sum of $1,262.50 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to a law firm, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT XIII

The Grand Jury further charges:

That on or about the 24th day of April, 1967, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, and JOHN A. WHITE, JR., both named as defendants herein, while employed by and officers, that is, Business Manager and President, respectively, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 129, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another the sum of $425.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid a check for the disbursement of the foregoing moneys and funds to Tilden-Thurber Corporation, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT XIV

The Grand Jury further charges:

That from on or about the 10th day of January, 1968, and continuously thereafter to and including the 22nd day of October, 1970, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, and JOHN A. WHITE, JR., both named as defendants herein, while employed by and officers, that is, Business Manager and President, respectively, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code,

unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another the sum of $577.50 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid checks for the disbursement of the foregoing moneys and funds to V. J. Berarducci & Sons, Berarducci & Sons Flower Shop, and Village Flower Shop, Inc., without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT XV

The Grand Jury further charges:

That on or about the 12th day of September, 1968, in the District of Rhode Island, JOHN A. WHITE, SR., also known as John A. White, and JOHN A. WHITE, JR., both named as defendant herein, while employed by and officers, that is, Business Manager and President, respectively, of International Union of Operating Engineers, Local No. 57, a labor organization engaged in an industry affecting commerce, as defined by Sections 402(i) and 402(j), Title 29, United States Code, unlawfully and wilfully did embezzle, steal, abstract and convert to their own use and the use of another the sum of $370.00 of the moneys and funds of said labor organization, by drawing and issuing, and causing to be drawn, issued and paid a check for the disbursement of the foregoing moneys and funds to John A. Hauser, doing business as Hauser Insurance Agency, without proper authorization and without benefit to said Local.

In violation of Title 29, United States Code, Section 501(c).

COUNT XVI

The Grand Jury further charges:

1. That from on or about the 24th day of April, 1967, and continuously thereafter to and including the 28th day of December, 1970, in the District of Rhode Island, and elsewhere, JOHN A. WHITE, SR., also known as John A. White, JOHN A. WHITE, JR., and EDWIN L. SULLIVAN, wilfully and knowingly, did combine, conspire, confederate and agree together and with each other, and divers other persons whose names are to the Grand Jury unknown, to wilfully and knowingly embezzle, steal, abstract and convert to their own use and the use of others the moneys and funds of International Union of Operating Engineers, Local No. 57 (hereinafter Local 57), a labor organization as defined by Sections 402(i) and 402(j), Title 29, United States Code: in violation of Title 29, United States Code, Section 501(c).

2. It was a part of said conspiracy that the said defendants would draw and issue, and cause to be drawn, issued and paid, checks for the disbursement of moneys and funds of Local 57 to John A. White, Sr., also known as John A. White, John A. White, Jr., and Edwin L. Sullivan, and others, in the form of unauthorized, unapproved, illegal, and void salary payments, bonuses, and gifts, for which said Local 57 would receive no benefit, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of others the moneys and funds of Local 57.

3. It was further a part of said conspiracy that the said defendants would draw and issue, and cause to be drawn, issued and paid checks for the disbursement of moneys and funds of Local 57 to oil companies in the form of unauthorized, unapproved, illegal and void payments for which said

Local 57 would receive no benefit for services provided by said oil companies to divers persons who were not members of Local 57, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of others the moneys and funds of Local 57.

4. It was further a part of said conspiracy that the defendants would draw and issue and cause to be drawn, issued and paid a check for the disbursement of moneys and funds of Local 57 to Jack Pendleton in the form of an unauthorized, unapproved, illegal and void payment for which Local 57 would receive no benefit to pay for a tile floor installed in the personal residence of John A. White, Sr., also known as John A. White, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of others the moneys and funds of Local 57.

5. It was further a part of the conspiracy that the defendants would draw and issue and cause to be drawn, issued and paid checks for the disbursement of moneys and funds of Local 57 to John A. White, Sr., also known as John A. White, John A. White, Jr. and Fields and Cusick Travel Service, Inc., in the form of unauthorized, unapproved, illegal and void payments for which the Union would receive no benefit to pay for travel, meals and lodging expenses incurred by the said John A. White, Sr., also known as John A. White, John A. White, Jr., and others, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of others the moneys and funds of Local 57.

6. It was further a part of said conspiracy that the defendants would draw and issue and cause to be drawn, issued and paid checks for the disbursement of moneys and funds of Local 57 to the New England Telephone Company in the form of unauthorized, unapproved, illegal and void payments for which said Local 57 would receive no benefit for services provided by said New England Telephone Company to a person who was not a member of

Local 57, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of another the moneys and funds of Local 57.

7. It was further a part of the conspiracy that the defendants would draw and issue and cause to be drawn, issued and paid checks for the disbursement of moneys and funds of Local 57 to a law firm in the form of unauthorized, unapproved, illegal and void payments for which the Union would receive no benefit for legal services provided by said law firm during an investigation conducted by the Internal Revenue Service of the United States Department of the Treasury into the tax liability of John A. White, Sr., also known as John A. White, and the Local 57 Softball Team, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of others the moneys and funds of Local 57.

8. It was further a part of the conspiracy that the defendants would draw and issue and cause to be drawn, issued and paid checks for the disbursement of moneys and funds of Local 57 to florists, a jeweler and an insurance agency in the form of unauthorized, unapproved, illegal and void payments for which Local 57 would receive no benefit for personal expenses incurred by the defendants for gifts to persons who were not members of Local 57 and insurance premiums, all for the purpose of embezzling, stealing, abstracting and converting to their own use and the use of others the moneys and funds of Local 57.

In furtherance of said conspiracy and to effect the objects and purposes thereof, the defendants did commit, among other things, the following:

OVERT ACTS

1. On or about the 15th day of July, 1968, in the District of Rhode Island, John A. White, Jr., signed three checks.

2. On or about the 18th day of July, 1968, in the District of Rhode Island Edwin L. Sullivan had a telephone con-

versation with someone in the offices of a certified public accountant.

3. On or about the 18th day of July, 1958, in the District of Rhode Island, John A. White, Jr., signed three checks.

4. On or about the 13th day of December, 1967, in the District of Rhode Island, John A. White, Jr., signed a check.

5. On or about the 8th day of May, 1967, in the District of Rhode Island, John A. White, Jr., signed a check.

6. On or about the 15th day of July, 1970, in the District of Rhode Island, John A. White, Jr., signed a check.

7. On or about the 27th day of January, 1968, in the District of Rhode Island, John A. White, Sr., had a conversation with Edwin L. Sullivan.

8. On or about the 14th day of February, 1968, in the District of Rhode Island, John A. White, Jr., signed a check.

9. On or about the 7th day of April, 1969, in the District of Rhode Island, John A. White, Jr., signed a check.

10. On or about the 12th day of September, 1968, in the District of Rhode Island, John A. White, Jr., signed a check.

In violation of Title 18, United States Code, Section 371.

A TRUE BILL:

/s/ Omer J. Brisson, Jr.
FOREMAN

/s/ Lincoln C. Almond

LINCOLN C. ALMOND
United States Attorney
/s/ S. Michael Levin

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1979

EDWIN L. SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his conviction on the grounds that (1) 29 U.S.C. 501(c) applies only to "constitutional officers" of a union; (2) the trial court erred in refusing to give certain instructions requested by petitioner; (3) his indictment was based on information improperly obtained by the grand jury; and (4) the jury's verdict of guilty was not supported by sufficient evidence.

After a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of two counts of unlawfully and willfully embezzling, stealing, abstracting and converting to his own use money and funds of the International Union of Operating Engineers, Local No. 57, without proper authorization by and benefit to said Local, in violation of 29 U.S.C. 501(c). He

was fined $1,500.[1] The conviction also made petitioner ineligible to hold union office for five years, 29 U.S.C. 504(c). The court of appeals affirmed (Pet. App. 19-29).

1. The evidence showed that, except for periods of military service, petitioner had been a member of Local 57 of the International Union of Operating Engineers since 1942, and a Union employee since 1950 (Tr. 257, 279).[2] Petitioner was also appointed to the office of "guard" in the Local (Govt. Ex. 1; Tr. 213, 259, 290, 365), and he held that office, as well as being a union employee, throughout the period of the transactions in question here (Tr. 275). The duties of the guard were mainly ritualistic in nature (see Pet. 9). Petitioner's responsibilities as a union employee involved the collection of members' monthly dues, which required that he be bonded (Tr. 73, 87, 304-306), and the preparation of Local 57's checks at the direction of one of the Whites (Tr. 282-283).[3]

The transactions to which petitioner's conviction related consisted of his receipt of unauthorized salary increases between July 1968 and December 31, 1970,[4] and

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[1]The indictment contained sixteen counts, alleging a conspiracy to embezzle, steal, abstract, or convey union funds by John White, Sr., then business manager of Local 57 (Tr. 103-104), John White, Jr., then president of and business agent for Local 57 (Tr. 104), and petitioner. White, Sr. was declared incompetent to stand trial and White, Jr. died before trial. Petitioner was tried on only two counts.

[2]"Tr." designates the transcript of the trial, a copy of which has been lodged with the Clerk of this Court.

[3]At the time of the trial, petitioner was business manager of the Local (Tr. 402-403). He remains in that office pending the outcome of this petition for a writ of certiorari, see 29 U.S.C. 504(c).

[4]The total gross amount of salary increases received by petitioner was $5,589.

his receipt of unauthorized Christmas bonuses during that period.[5] Petitioner conceded receipt of the increases and bonuses, but he testified that at the time of receipt he did not believe that the payments were illegal (Tr. 278, 331-332).

At all relevant times the Union's constitution prohibited payments of Local funds for gifts or additional compensation, unless approved by the membership of the Local and the General President of the Union (Govt. Ex. 8; Tr. 55, 117). Although authorizations for expenditures were customarily recorded, the minute book of Local 57 contained no reference to approval of the salary increases and bonuses paid to petitioner (Govt. Ex. 1; Tr. 26, 115-116, 126-127, 201-202, 205-206, 341-351).

2. Petitioner's contention that his indictment should have been quashed because union records subpoenaed by federal grand jury were transmitted to a second grand jury rather than returned to the union (Pet. 6-7) is without merit. Although not mentioned in the petition, this issue was fully considered and decided adversely to petitioner's contentions in *In re Grand Jury Subpoena of John A. White, President, International Union of Operating Engineers, Local 57* (C.A. 1, No. 72-1277), certiorari denied *sub nom. International Union of Operating Engineers, Local 57* v. *United States*, 411 U.S. 948.[6] There is, thus, no occasion for further review of this issue.

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[5]The bonuses were paid out of checks drawn by the Local payable to either John White, Sr. or to cash. The total amount of the checks was $3,600. Petitioner received bonuses totaling $445.

[6]The facts relating to this issue are set forth in our memorandum in *International Union of Operating Engineers, Local 57* v. *United States*, No. 72-1102, a copy of which is being served on petitioner.

In addition, since the records in question were union records as to which petitioner has no proprietary interest, he has no standing to complain about their use by the grand jury. Nor can petitioner challenge his indictment on the ground that union records should have been returned to the union and resubpoenaed by the grand jury. See *United States* v. *Calandra*, 414 U.S. 338.

3. Petitioner's second contention is that 29 U.S.C. 501(c) applies only to those union offices enumerated in 29 U.S.C. 402(q) and 501(a), which petitioner describes as offices with fiduciary responsibilities (Pet. 7-10). This contention is contrary to the plain language of 29 U.S.C. 501(c), which provides in relevant part as follows:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the uses of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, *or by which he is employed*, * * * shall be fined * * *. [Emphasis added.]

The court of appeals held that while a fiduciary relationship may be a necessary element of embezzlement under 29 U.S.C. 501(c), it is not required for stealing, abstracting, or conversion—activities that are also covered by Section 501(c).

Moreover, the court of appeals correctly held that even assuming petitioner's construction of Section 501(c) to be correct, the record showed that petitioner was an "officer" within the meaning of 29 U.S.C. 501(a) or a "key administrative" employee within the meaning of 29 U.S.C. 402(q). (See Pet. App. 23-25.)

4. Petitioner's remaining contentions are also without merit:

(a) For the reasons stated above, the district court properly refused to instruct the jury that it must find that petitioner was a "constitutional" officer in order to convict for a violation of 29 U.S.C. 501(c).

(b) Considering the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, there was sufficient evidence supporting the jury's verdict of guilty. As the court of appeals held (Pet. App. 28-29):

> Although there was no direct evidence of defendant's knowledge that the payments were unauthorized, we think that this was inferable from the government's other proof. In the first place, the union's minute book indicated that defendant attended virtually every meeting of the general membership during the period covered by the indictment, including all meetings immediately preceding his July 15, 1968, raise and his December 1968, 1969 and 1970 bonuses. Since the constitution required that the general membership approve of these payments, and since his attendance at those meetings must have made it plain to him that no such approval was ever given or even considered, it was clearly reasonable for the jury to conclude that defendant did, in fact, know that the payments were improper and illegal. Secondly, the evidence establishes a closer working relationship between defendant and the Whites, who effectively ran the union. To the extent that the evidence also suggested that the Whites knew, or must have known, that these and other payments were illegal, it was permissible for the jury to infer that defendant possessed the same knowledge. Thus, in our view, the evidence satisfactorily established that defendant, a union officer and employee, improperly received for

his own benefit misappropriated and unauthorized union funds, knowing that his receipt of those funds was unlawful. Such evidence is, we believe, sufficient to sustain his conviction under §501(c).

(c) Prior to trial the United States Attorney agreed with petitioner's counsel not to refer in his opening statement to White, Sr., and White, Jr., both of whom were named in the indictment but were not tried with petitioner. The trial judge did not participate in and was not bound by the agreement, and his reference to the Whites in reading to the jury the two counts of the indictment involving petitioner was within his discretion. See *United States* v. *Marquez*, 424 F. 2d 236, 240 (C.A. 2), certiorari denied, 400 U.S. 828.

(d) Petitioner's contention that the trial judge failed to instruct the jury on the common law definitions of embezzlement, stealing, abstracting and converting (Pet. 16) is refuted by the judge's charge, in which he meticulously defined each of those terms (Tr. 443). A fair reading of the charge could leave no doubt that the jury was adequately advised of the elements of the offense. See *United States* v. *Brill*, 350 F. 2d 171, 176 (C.A. 2), certiorari denied *sub nom. Scalza* v. *United States*, 382 U.S. 973; *Woxberg* v. *United States*, 329 F. 2d 284, 290 (C.A. 9), certiorari denied, 379 U.S. 823.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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